

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 93-17
Table of Allotments,)	RM-8170
FM Broadcast Stations.)	
(Rosendale, New York))	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 22, 1998

Released: October 6, 1998

By the Commission:

1. The Commission has before it a Motion for Clarification and/or Further Review filed by the State University of New York ("SUNY") directed to the most recent staff Memorandum Opinion and Order in this proceeding, 13 FCC Rcd 308 (1998). The 1998 staff Memorandum Opinion and Order dismissed a Petition for Reconsideration filed by SUNY directed to our earlier Memorandum Opinion and Order denying the SUNY Application for Review, 12 FCC Rcd 10020 (1997). The Motion for Clarification seeks clarification as to whether the 1998 staff Memorandum Opinion and Order is intended to be the final Commission response to SUNY's requests for review in this proceeding. Inasmuch as the SUNY pleading specifically requests that we review this matter again, we are, in a procedural context, processing the entire pleading as an Application for Review. We agree with the staff action dismissing the Petition for Reconsideration, and affirm that action.

2. In addition, we are taking this opportunity to clarify one aspect of our earlier resolution of the earlier SUNY Application for Review. In footnote 10 of its Application for Review, SUNY stated that it "would accept a condition on its license restricting the stations use to noncommercial educational purposes." We do not construe this to be a request to have the channel reserved for noncommercial educational use.¹ In any event, as explained in the 1998

¹It appears that SUNY first indicated a willingness to have the frequency reserved for noncommercial educational use in its Consolidated Reply to oppositions filed to its Petition for Reconsideration of the Report and Order, 10 FCC Rcd 11471 (1995). Consolidated Reply (filed January 26, 1996). However, SUNY's alternative request was not presented to the Commission

staff Memorandum Opinion and Order, such a request should have been submitted prior to the Report and Order in this proceeding. See Memorandum Opinion and Order, 13 FCC Rcd 308 ¶ 5 (1998). We do not believe that it would be in the public interest to permit SUNY to request that its license be modified to a commercial allotment, without entertaining competing expressions of interest, and, once an unfavorable decision has been rendered, to submit an untimely alternative request to have its license modified to Channel 273A with a condition. In addition to being unfair to the nine other applicants who have filed applications based upon our action in the Report and Order, such a procedure would be contrary to the public interest benefit of an orderly and efficient transaction of Commission business. See Colorado Radio Corp. v. FCC, 118 F.2d 24 (D.C. Cir. 1994); Idaho Broadcasting, Inc., 11 FCC Rcd 5264 (1996).

3. In any event, even assuming SUNY had made a timely request to have its Station WFPN license modified to a reserved Channel 273A allotment, SUNY has never submitted an engineering showing that noncommercial educational channels were unavailable due to TV Channel 6 interference or preclusion by a foreign allotment. As stated in the Notice of Proposed Rule Making in this proceeding, such a submission is a prerequisite to reserving a commercial channel such as Channel 273A for noncommercial educational use. 8 FCC Rcd 947 (1993). In this connection, we note that SUNY in its Consolidated Reply to the oppositions to its original Petition for Reconsideration referred to such an engineering submission by Sacred Heart University in support of its joint counterproposal in this proceeding. The Sacred Heart University joint counterproposal was determined to be both procedurally and technically defective and, along with its engineering submission, was not considered in this proceeding. Similarly, in view of the fact that SUNY expressly stated that it did not want its license modified to a reserved Channel 273A allotment, there was no need for the staff to consider this submission in the context of the SUNY proposal.

4. We recognize that the staff's Notice of Proposed Rule Making in this proceeding incorrectly suggested that we could modify a noncommercial educational FM license to an unreserved commercial FM channel in a rulemaking proceeding. But we do not believe that this error so prejudiced SUNY as to warrant an exception to our established rules and policies in this area. Indeed, the Notice specifically requested that SUNY provide information regarding the availability of channels in the noncommercial educational FM band and clarify whether it sought to have Channel 273A allotted on a commercial or noncommercial educational basis. In comments filed in response to the Notice, SUNY stated that it did not want Channel 273A reserved for noncommercial educational use. We consequently believe that our action in this proceeding allotting Channel 273A to Rosendale and opening a filing window for this channel will provide significant public interest benefits that override SUNY's objections.

when SUNY sought review of the staff's 1996 Memorandum Opinion and Order, 11 FCC Rcd 3607 (1996), which denied that Petition for Reconsideration. As noted above, we do not construe footnote 10 in SUNY's Application for Review to constitute a request to have the channel reserved for noncommercial educational use. Thus, we believe that SUNY did not preserve this argument before the Commission.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, the aforementioned Motion for Clarification and/or Further Review filed by the State University of New York IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary